

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

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FIRST GENERAL COUNSEL'S REPORT

MUR 6869

DATE COMPLAINT FILED: 09/11/14, 11/25/14

DATE OF NOTIFICATION: 09/17/14, 12/01/14

DATE RESPONSE FILED: 12/15/14

DATE SUPP. FILED: 04/15/15

DATE SUPP. RESPONSE FILED: 5/26/15

DATE ACTIVATED: 01/29/15

EXPIRATION OF SOL: 09/1993-09/2017

ELECTION CYCLE: 1987-88 through 2011-12

COMPLAINANTS:

Level the Playing Field
Peter Ackerman

RESPONDENTS:

Commission on Presidential Debates ("CPD")
Frank Fahrenkopf, Jr., Co-Chair, CPD
Michael D. McCurry, Co-Chair, CPD

**RELEVANT STATUTES
AND REGULATIONS:**

52 U.S.C. § 30101(9)(B)(ii)¹

52 U.S.C. § 30103

52 U.S.C. § 30104

52 U.S.C. § 30116(f)

52 U.S.C. § 30118(a)

11 C.F.R. § 110.13

11 C.F.R. § 114.4(f)

INTERNAL REPORTS CHECKED: FEC Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

The Complaint in this matter alleges that the Commission on Presidential Debates and Co-Chairs Frank Fahrenkopf, Jr., and Michael D. McCurry failed to comply with the Commission's regulations governing debate sponsorship and thereby violated the Federal

¹ On September 1, 2014, the Federal Election Campaign Act of 1971, as amended, was transferred from Title 2 to new Title 52 of the United States Code.

1 Election Campaign Act of 1971, as amended (the "Act"), by making prohibited contributions
2 and expenditures, accepting prohibited contributions, and failing to register and report as a
3 political committee.² In a joint response, Respondents deny the allegations and assert that the
4 Commission has considered and rejected Complainant's arguments on multiple occasions.
5 Accordingly, the CPD requests that the Commission dismiss the Complaint. Thereafter,
6 Complainants filed a Supplement that relies on a reported statement by Fahrenkopf, which
7 they allege presents new evidence supportive of the Complaint's allegations. Respondents
8 assert that the claim in the Supplement is without merit.

9 Based on a review of the Complaint, Supplement, Responses, and Commission
10 precedent, we recommend that the Commission find no reason to believe that the Respondents
11 violated the Act and close the file in this matter.

12 II. FACTUAL AND LEGAL ANALYSIS

13 The CPD is a 26 U.S.C. § 501(c)(3) organization that incorporated in the District of
14 Columbia in 1987 as a private, not-for-profit corporation to "organize, manage, produce,
15 publicize and support debates for the candidates for President of the United States." Resp.
16 at 1-3 (Dec. 15, 2014). Respondents state that the CPD derives its funding from sources that
17 include corporations, foundations, universities, and private donations. *Id.* at 3-4.

18 According to Respondents, the CPD has staged presidential general election debates
19 since 1988 pursuant to the Act's safe harbor provision that exempts from the definition of
20 "expenditure" "nonpartisan activity designed to encourage individuals to vote or to register to
21 vote." Resp. at 7; 52 U.S.C. § 30101(9)(B)(ii). This exemption permits "[n]onprofit

² On the same day Complainants filed this Complaint, they also filed a rulemaking petition asking the Commission to amend 11 C.F.R. § 110.13 to revise the criteria governing the inclusion of candidates in presidential candidate debates. See Letter from Alexandra A.E. Shapiro, Counsel, Level the Playing Field (Sept. 11, 2014).

1 organizations described in 26 U.S.C. § 501(c)(3) or (c)(4) and which do not endorse, support,
2 or oppose political candidates or political parties” to stage candidate debates in accordance
3 with 11 C.F.R. §§ 110.13 and 114.4(f). 11 C.F.R. § 110.13(a)(1); Explanation and
4 Justification, Funding and Sponsorship of Federal Candidate Debates, 44 Fed. Reg. 76,734
5 (Dec. 27, 1979) (“110.13 E&J”). The regulations leave the structure of the debate to the
6 discretion of the staging organization, provided that the organization does not arrange the
7 debates in a manner that promotes or advances one candidate over another, and that the
8 criteria for candidate selection are objective and pre-established. 11 C.F.R. § 110.13(b), (c).
9 Pursuant to section 114.4(f), the staging organization may use its own funds and may accept
10 funds donated by corporations to defray costs incurred in staging candidate debates. Thus, if
11 the debate staging organization meets the requirements of section 110.13(a)(1), and stages
12 debates in accordance with sections 110.13(b) and (c) and section 114.4(f), the organization’s
13 activities are exempt from the definitions of “contribution” and “expenditure.” *See* 110.13
14 E&J; Explanation and Justification, Corporate and Labor Organization Activity, 60 Fed. Reg.
15 64,260, 64,261 (Dec. 14, 1995); 11 C.F.R. § 100.154 (“Funds used to defray costs incurred in
16 staging candidate debates in accordance with the provisions of 11 C.F.R. § 110.13 and
17 114.4(f) are not expenditures.”).

18 The Complaint traces the CPD’s history as a purported instrument of the Democratic
19 and Republican parties since its creation in 1987 and alleges that the CPD’s 15% polling
20 requirement is intended to limit participation to Democratic and Republican nominees. More
21 specifically, the Complaint alleges that Respondents failed to comply with the Commission’s
22 regulations governing debate sponsorship because the CPD: (1) is not non-partisan and
23 therefore is not a qualified “staging organization,” and (2) failed to apply pre-established,

1 objective criteria because its criteria include a public opinion polling requirement that is
2 intended to limit participation to Democratic and Republican nominees and discriminate
3 against independent and third-party candidates. Compl. at 15-53 (Sept. 11, 2014). *See*
4 11 C.F.R. § 110.13(a)(1), (c). The Complaint argues that because Respondents failed to
5 comply with section 110.13, they made prohibited contributions and expenditures in violation
6 of 52 U.S.C. § 30118, accepted prohibited contributions in violation of 52 U.S.C. § 30116(f),
7 and failed to register and report as a political committee in violation of 52 U.S.C. §§ 30103
8 and 30104. *Id.* at 57-59.

9 Respondents deny the allegations, asserting that the CPD does not “endorse, support,
10 or oppose political candidates or political parties,” and that it “adopts nonpartisan candidate
11 selection criteria well in advance of each general election debate season and it adopts and
12 applies those criteria solely to advance the educational purposes of its debates and not to
13 advance or oppose any candidate or political party.” Resp. at 4.

14 The CPD further asserts that it used the same candidate selection criteria for the 2012
15 presidential general election debates as it did during the 2000, 2004, and 2008 elections:³
16 (1) evidence of the candidate’s constitutional eligibility to serve as President; (2) evidence of
17 ballot access, meaning that the candidate qualified to have his or her name appear on enough
18 state ballots to have at least a mathematical chance of securing an electoral majority in the
19 2012 general election; and (3) indicators of electoral support of at least 15% of the national
20 electorate as determined by five selected national public opinion polling organizations, using

³ The CPD appears to have disclosed these criteria on October 20, 2011, for the 2012 debates. *See* Commission on Presidential Debates Homepage, <http://www.debates.org/index.php?page=candidate-selection-process> (last visited June 11, 2015).

1 the average of those organizations' most recently publicly reported results at the time of the
2 determination. *See* Resp. at 6-7, Ex. 1, Tabs B-E.

3 Respondents assert that the CPD's criteria satisfy the requirements of section
4 110.13(c) and the Complaint's allegations should be rejected, a conclusion supported by
5 Commission precedent. *See* Resp. at 6-12. Indeed, previous MUR complainants have made
6 similar allegations against the CPD's status as a staging organization and its candidate
7 selection criteria, and in all such previous matters, the Commission found no reason to believe
8 the CPD had violated the Act. In MURs 4987, 5004, and 5021, complainants alleged that the
9 CPD and its board of directors were bipartisan, not nonpartisan, because the CPD was created
10 by the former chairs of the DNC and RNC to allow the major parties to control the
11 presidential and vice presidential debates and to promote their candidates, in violation of
12 11 C.F.R. § 110.13(a). Complainants also maintained that the CPD's 2000 debate selection
13 criteria – the same criteria used in 2012 – were subjective and violated 11 C.F.R. § 110.13(c),
14 particularly its requirement that debate participants demonstrate popular support levels of at
15 least 15 percent. The Commission found no reason to believe that the CPD and its Co-Chairs
16 violated former 2 U.S.C. §§ 433, 434, 441a(f) and 441b(a) (now 52 U.S.C. §§ 30103, 30104,
17 30116(f), and 30118(a)) in those matters. *See* Certification, MURs 4987, 5004, and 5021
18 ¶¶ 1, 4, and 7 (July 20, 2000).

19 The Complainants contested the dismissal of MUR 4987 under former 2 U.S.C.
20 § 437g(a)(8) (now 52 U.S.C. § 30109(a)(8)), but the court upheld the dismissal and the
21 Commission's determination that the CPD was an eligible debate staging organization, as well
22 as its conclusion that the "15% support level set by the CPD" in its third criterion, was not
23 inconsistent with the Commission's regulations. *Buchanan v. FEC*, 112 F. Supp. 2d 58, 74

1 (D.D.C. 2000), *aff'd in part*, No. 00-5337 (D.C. Cir. Sept. 29, 2000). The court specifically
2 addressed the CPD's use of pre-debate polling criticized in the current matter. The *Buchanan*
3 court held that it was not unreasonable or subjective to consider the extent of a candidate's
4 electoral support prior to the debate to determine whether the candidate was viable enough to
5 be included. *Id.* at 75; *see also Natural Law Party v. FEC*, Civ. Action No. 00-02138 (D.D.C.
6 Sept. 21, 2000), *aff'd in part*, No. 00-5338 (D.C. Cir. Sept. 29, 2000) (brought by
7 complainants in MUR 5004, the court found for the Commission based on the reasoning set
8 forth in *Buchanan.*).

9 Likewise, the complainant in MUR 5207 alleged that the CPD was partisan and that
10 the major parties monopolized the debates by arranging to limit participation to their
11 candidates, and the Commission found no reason to believe that the CPD and its Co-Chairs
12 violated former 2 U.S.C. §§ 433, 434, 441a(f) and 441b(a). *See* Certification, MUR 5207
13 (Aug. 8, 2002). Further, in MUR 5414, the complainant generally contended that the CPD
14 was a product of the two major parties, actively promoted their interests, and was so strongly
15 biased against third-party candidates that it violated the "nonpartisan" and "debate selection
16 criteria" prongs of the Commission's debate regulations. Again, the Commission found no
17 reason to believe that the CPD had violated or was violating former 2 U.S.C. § 441b(a). *See*
18 Certification, MUR 5414 (Dec. 14, 2004). Finally, in MUR 5530, the complainant argued
19 that the CPD's 2004 debate selection criteria – the same criteria used in 2012 – particularly its
20 requirement that debate participants demonstrate popular support levels of at least 15%, was
21 "partisan" and a deliberate attempt to avoid including those candidates who theoretically
22 could win the election based on their ballot access. The Commission found no reason to

1 believe that the CPD violated former 2 U.S.C. § 441b(a). *See* Certification, MUR 5530
2 (May 5, 2005).

3 In their Supplement, the Complainants allege that in an interview with Sky News in
4 the United Kingdom on April 1, 2015, CPD Co-Chair Fahrenkopf “admitted” that the CPD’s
5 system for selecting general election debate candidates “consists of ‘go[ing] with the two
6 leading candidates, it’s [sic] been the two political party candidates.’”⁴ Supp. at 1-2. This
7 statement, the Complainants argue, provides further corroboration of the Complaint’s
8 allegation that the CPD supports the Republican and Democratic parties and opposes third
9 parties and independents, in violation of the candidate debate regulations. *Id.*

10 Although Fahrenkopf’s reported statement can be interpreted in more than one way, it
11 does not, by itself or taken together with the other available information, suggest that CPD
12 violated the candidate debate regulations. In response to a question about the prospect of
13 having seven candidates in a debate, Fahrenkopf reportedly stated that “we . . . primarily go
14 with the two leading candidates, it’s been the two political party candidates . . . except for
15 1992 when Ross Perot participated in the debates.” *See* Supp., Ex. A at 2. In response to the

⁴ The relevant portion of the Sky News interview follows:

Interviewer: And, this time around, of course, together, the television companies wanting to do the two lead candidates, the three lead candidates, and then a four candidate debate, the conservative leader said he wouldn’t do that, and we’ve ended up with a seven person, a seven party, debate. What do you think the prospects for that are?

Frank Fahrenkopf: Well, you know the primary debates here in the United States, we often — and of course the Republicans three years ago, had seven or eight people on the stage, and people jokingly say it’s less of a debate than a cattle show, because there’s such little time for each candidate to get across in the short period what their views are on issues. That’s why in the general election debate, we have a system, and we, you know, as you know, primarily go with the two leading candidates, it’s been the two political party candidates, save in except for 1992 when Ross Perot participated in the debates. So, seven people on the stage at one time is very difficult, it’s going to take a very clever moderator to make sure that each candidate gets an opportunity to put forth their views.

Supp., Ex. A at 2 (transcript of interview).

1 Supplement, Fahrenkopf averred in a declaration that he "noted the historical fact that, in the
2 United States, the general election debates usually have been between two candidates, who
3 have been the major party nominees." Supp. Resp., Fahrenkopf Decl. ¶ 4. Fahrenkopf's
4 interview statement is subject to more than one interpretation, but even if by "we . . .
5 primarily go with the two leading candidates" he was referring to CPD's actions, his
6 statement does not sufficiently suggest that it failed to use pre-established, objective criteria in
7 selecting debate participants. *See* 11 C.F.R. § 110.13(c).

8 In sum, the Complainants make the same allegations regarding the same candidate
9 selection criteria that the Commission has considered and found insufficient to support a
10 reason to believe finding, and the Supplement does not provide any additional information
11 indicating that CPD violated the Act.⁵ Therefore, we recommend that the Commission find
12 no reason to believe that the Commission on Presidential Debates or Frank Fahrenkopf, Jr.
13 and Michael D. McCurry as Co-Chairs violated 52 U.S.C. §§ 30118(a) or 30116(f), and no
14 reason to believe that the Commission on Presidential Debates violated 52 U.S.C. §§ 30103 or
15 30104. We also recommend that the Commission close the file.

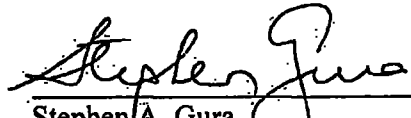
⁵ Complainants argue that the Commission should not dismiss this matter based on prior decisions because the Complaint contains new evidence and arguments that the Commission has not previously addressed. Compl. at 53. Specifically, the Complaint claims that it presents "different and detailed evidence" that demonstrates (a) that the 15% polling criterion is not reasonably achievable for a third-party or independent candidate and (b) that polling criterion in a three-way race will systematically disfavor third-party and independent candidates. *Id.* Even if CPD's 15% polling criterion may tend to exclude third-party and independent candidates, Complainants have not shown – as previous Complainants did not show – that the CPD failed to use pre-established, objective criteria. *See* 11 C.F.R. § 110.13(c).

III. RECOMMENDATIONS

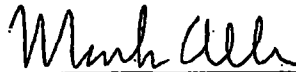
1. Find no reason to believe that the Commission on Presidential Debates or Frank Fahrenkopf, Jr., and Michael D. McCurry as Co-Chairs violated 52 U.S.C. § 30118(a).
2. Find no reason to believe that the Commission on Presidential Debates or Frank Fahrenkopf, Jr., and Michael D. McCurry as Co-Chairs violated 52 U.S.C. § 30116(f).
3. Find no reason to believe that the Commission on Presidential Debates violated 52 U.S.C. §§ 30103 or 30104.
4. Approve the attached Factual and Legal Analysis.
5. Approve the appropriate letters.
6. Close the file.

6.17.15

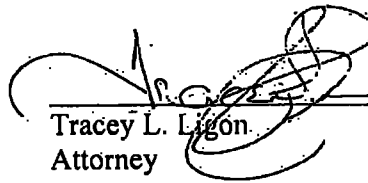
Date



Stephen A. Gura
Deputy Associate General Counsel
for Enforcement



Mark Allen
Assistant General Counsel



Tracey L. Ligon
Attorney